



INDUSTRY CIRCULAR

DEPARTMENT OF
THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

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ATF RULING ON FLAVORS CONTAINING ALCOHOL ADDED TO MALT BEVERAGES

Brewers and Others Concerned:

Purpose. The purpose of this circular is to advise you of a ruling to be published in the near future in the ATF Quarterly Bulletin. This ruling concerns the addition of flavoring materials containing alcohol to malt beverages at a brewery. It also announces that the Bureau of Alcohol, Tobacco and Firearms will commence rulemaking on the subject of flavoring materials containing alcohol in the near future.

Text of ruling. The text of the ruling to be published in the next issue of the ATF Quarterly Bulletin is as follows:

ATF Ruling 96-1

Background. The Bureau of Alcohol, Tobacco and Firearms (ATF) has been asked to clarify the application of the malt beverage definition of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. § 211(a)(7), to flavored fermented beverages being produced under a statement of process approved under the Internal Revenue Code of 1986, 26 U.S.C. § 5052, and its implementing regulations at 27 CFR § 25.67.

In recent years, statements of process have been submitted to ATF for malt beverage products which are produced with various flavoring materials and which have a wide range of alcoholic content. Some of these products are produced from a stripped malt beverage base and lack the traditional characteristics associated with a malt beverage, such as a lager, ale or stout.

The FAA Act and its implementing regulations, 27 U.S.C. § 211(a)(7) and 27 CFR § 7.10, define "malt beverage" as

"a beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, of malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrate or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption." (Emphasis added.)

The legislative history of the FAA Act simply explains that "(t)he definition of malt beverages is a technical one designed to cover the beverage products of the brewing industry and includes such products regardless of their alcoholic content." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 16 (1935). It is apparent that Congress, in not setting parameters for the contribution of alcohol from other

sources as it did with respect to distilled spirits and wine, intended that malt beverages not contain such outside alcohol. The question remains as to whether a de minimis amount of alcohol derived from sources other than fermentation at the brewery would be consistent with the statutory definition.

Under a strict interpretation of the definition, the alcohol present in a malt beverage must be the result solely of fermentation at the brewery. This conclusion is consistent with the characteristics of malt beverages that were produced by the brewing industry at the time of the enactment of the technical definition pursuant to the FAA Act. This interpretation encompasses malt beverages containing alcohol derived from adjuncts such as fruits, berries, herbs, or vegetables as well as from the more traditional cereal grains, sugars and syrups when such adjuncts are added to the product prior to fermentation.

Unlike the law and regulations relating to distilled spirits and wines, regulations relating to malt beverages in 27 CFR Part 7 do not expressly authorize the addition of flavoring materials or other materials containing alcohol. The class and type regulation in § 7.24(a) authorizes the use of fanciful names and statements of composition for products which are not known to the trade under a particular designation; however, this section only applies to labeling and is not authorization for the use of flavorings or other materials in the production of a malt beverage.

While the malt beverage regulations do not authorize the use of flavoring materials containing alcohol, ATF has, in its approval of statements of process for fermented beverages under § 25.67 and in the approval of labels for malt beverages under § 7.20, recognized the use of such materials in the production of malt beverages. However, an increasing number of "flavored malt beverages" have varied and diverse characteristics which distinguish them from traditional malt beverages. Further, these characteristics are so diverse that the demarcations between "flavored malt beverages" and distilled spirits or wine products are becoming increasingly blurred and undefined.

In order to prevent the consumer deception that can arise from the lack of distinction between these "flavored malt beverages" and similar wine and distilled spirits products, and in order to determine the parameters of the use of flavoring materials containing alcohol, ATF has decided to undertake rulemaking in the near future. This rulemaking will consider the prohibition, restriction, or limitation on the use of such flavoring materials at any stage in the production of malt beverages.

ATF likewise recognizes that "flavored malt beverages" are currently produced and marketed where the alcohol content is not solely the result of fermentation at the brewery in accordance with the FAA Act definition. Pending the outcome of rulemaking on the use of such flavoring materials containing alcohol, a strict interpretation of the malt beverage definition would adversely impact these products or similar products that brewers plan to produce. ATF has reviewed these "flavored malt beverages" which are currently produced and which are currently marketed, and has identified the nature, character, and parameters of these products. ATF has determined that at the present time, the only "flavored malt beverages" containing a significant amount of alcohol derived from added flavoring materials, and for which statements of processes approved under § 25.67 explicitly indicate the source and quantity of added alcohol from flavors, are for products which contain six percent or less alcohol by volume in the finished product. Although ATF has approved statements of process under § 25.67 for "flavored malt beverages" containing in excess of six percent alcohol by volume, in no instance has the quantitative amount of alcoholic flavoring material used in such products contributed more than 1.5 percent alcohol by volume to the finished product.

As part of the pending rulemaking, ATF will consider the possibility that alcohol which is not solely the result of fermentation at the brewery is within the ambit of the FAA Act definition of a malt beverage when such alcohol is derived from wholesome products suitable for human food con-

sumption. However, it is possible that this portion of the definition authorizes only the addition of the types of adjuncts described above, and does not encompass the addition of flavoring materials which contain alcohol not derived from fermentation at the brewery. Prior to completion of rulemaking, ATF will permit production of "flavored malt beverages" of the types already existing in the marketplace, and we will approve statements of process for new "flavored malt beverages" which are comparable to existing products.

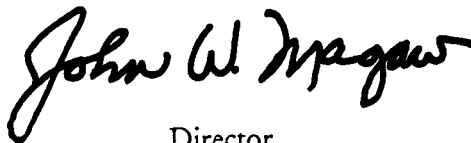
Held, a malt beverage under the FAA Act may only contain alcohol which is the result of alcoholic fermentation at the brewery.

Held further, pending completion of rulemaking, ATF will allow the continued production or importation of fermented beverages which contain alcohol not solely the result of alcoholic fermentation at the brewery if: (1) they are "flavored malt beverages" which contain not more than six percent alcohol by volume in the finished product; or (2) they are "flavored malt beverages" containing in excess of six percent alcohol by volume in the finished product and derive not more than 1.5 percent of their overall alcohol content from alcohol added through the use of alcoholic flavoring materials.

Pending the completion of rulemaking, ATF will continue to approve statements of process and applications for certificates of label approval for "flavored fermented beverages" meeting these criteria unless other grounds for disapproval are present. Statements of process submitted under § 25.67 for "flavored malt beverages" which include the use of any alcoholic flavoring materials shall explicitly indicate: the volume and alcoholic content of the malt beverage base; the maximum volumes of such flavoring materials proposed to be used; the alcoholic strength of such flavoring materials; the overall alcoholic contribution to the finished product provided by the addition of any alcoholic flavoring materials; and the final volume and alcoholic content of the finished product.

Effect of ruling. Any new or amended statements of process or formulas for a "fermented malt beverage" shall comply with the provisions of the ruling with respect to the amount of alcohol contributed through the use of alcoholic flavoring materials. ATF will further consider the addition of flavoring materials containing alcohol to fermented malt beverages by the issuance of a notice of proposed rulemaking in the near future.

Inquiries. Inquiries concerning this circular should refer to its number and be addressed to the Deputy Associate Director (Regulatory Enforcement Programs), Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue, NW, Washington, DC 20226.



Director